Supreme Court, U.S.
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No. 04-1260

In The

Supreme Court of the United States

CITY OF PORTLAND,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telecommunications Act, 47 U.S.C. § 253(a), provides, "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Based on undisputed facts, the district court below, on cross-motions for summary judgment, dismissed the claims of Qwest Corporation, an incumbent telephone company, challenging Portland's regulations and requirements, because Qwest had failed to make any showing of "a single telecommunications service that it, or any other entity, is effectively prohibited from providing." On Qwest's appeal, the Ninth Circuit remanded, holding that Qwest was not required to make "an actual showing" of a prohibition or effective prohibition, but that local regulations and requirements would be preempted if they "*may* prohibit" provision of a telecommunications service.

The petition thus presents these questions:

1. Must an entity seeking preemption under 47 U.S.C. § 253(a) establish that a challenged State or local regulation or requirement has, in fact, prohibited or had the effect of prohibiting the entity's provision of telecommunications services, or may a court base preemption on its mere speculation that it is possible that a prohibition might ultimately result from the regulation or requirement?

2. In order to have standing to pursue a preemption claim under 47 U.S.C. § 253(a), must an entity show that it in fact has been prohibited, or effectively prohibited, from providing one or more telecommunications services?

QUESTIONS PRESENTED – Continued

3. Does this Court's precedent require that, in order to survive a motion for summary judgment on a preemption claim under 47 U.S.C. § 253(a), an entity must come forward with evidence showing that the entity has been prohibited, or effectively prohibited, from providing one or more telecommunications services?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit and in the United States District Court for the District of Oregon were:

Petitioner – The Petitioner is the City of Portland, a municipal corporation organized and existing under the laws of the State of Oregon. Petitioner was a defendant in the District Court and an appellee before the Ninth Circuit.

Respondent – The Respondent is Qwest Corporation, a Colorado corporation. Respondent was the plaintiff in the District Court and was the appellant before the Ninth Circuit.

Intervenors – Nine additional Oregon cities intervened as defendants in the District Court and were appellees in the Ninth Circuit. These were: City of Happy Valley, City of Keizer, City of North Plains, City of Pendleton, City of Redmond, City of Salem, City of Eugene, City of Springfield, and City of Ashland.

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The decision which petitioner seeks to have this Court review is reported as *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004). The orders denying the petitions for rehearing are not reported. The district court's opinion, which was affirmed in part and reversed in part by the Ninth Circuit, is reported as *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its decision in this case on October 12, 2004. The orders denying the petitions for rehearing were entered on December 17, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari. This petition is timely under 28 U.S.C. § 2101 and under Rules 13.1 and 13.3 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under a provision of the Telecommunications Act of 1996, 47 U.S.C. § 253, which provides:

> Sec. 253 REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any

interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

This case also implicates Section 601 of the Telecommunications Act, 110 Stat. 143, 47 U.S.C. § 152n:

(c) FEDERAL, STATE AND LOCAL LAW. –

(1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be

construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION. – Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

STATEMENT OF THE CASE

1. Introduction

This case raises important, recurring questions relating to the preemptive scope of Section 253(a) of the federal Telecommunications Act. In particular, the case presents the question whether a telecommunications provider can pursue a claim under Section 253(a) to preempt local laws and regulations, in the face of undisputed evidence that it has not been prohibited or effectively prohibited from providing any telecommunications service. The Ninth Circuit's decision authorizes such a claim, and would preempt local regulations and requirements on the specter of mere speculation that they might in the future produce the effects the statute proscribes. This Court's discussion of Section 253 and related provisions of the Telecommunications Act do not support the Ninth Circuit's decision. The Ninth Circuit's decision also is inconsistent with this Court's jurisprudence with respect to preemption, standing and summary judgment.

The Ninth Circuit's approach conflicts directly with decisions of the Federal Telecommunications Commission.

2. Factual Background

Portland's streets must accommodate competing uses by traffic signal operations for traffic control, street lighting, railroads, light rail transit, sanitary sewers, storm sewers, potable water distribution, electric power distribution, natural gas distribution and telecommunications facilities. The City requires all utilities occupying its right-of-way (including communications companies) to obtain franchises or other grants of authority from the City Council.

Any telecommunications provider wanting to occupy the right-of-way may do so by filing a one-page franchise application with the City. Making market entry even easier, the City has issued temporary permits while franchise applications are being processed. Pursuant to Portland's franchise process, by the year 2000, over 30 telecommunications providers either had been granted franchises or had applications in process. These franchises contain terms and conditions similar to those in Qwest's current permit. The City has never denied a telecommunications franchise to any applicant, nor has the City refused to renew or extend the term of a telecommunications franchise. Portland's franchising process has worked to promote telecommunications competition. The Oregon Public Utilities Commission has recognized as much.

Qwest Corporation and its predecessors have provided local telephone service in Portland, Oregon, for over a century. As is true with all telecommunications providers everywhere, Qwest and its predecessors in Portland have

used the public rights-of-way for locating transmission lines and other infrastructure necessary to their provision of telecommunications services to their customers. The use of the City's rights-of-way always has been subject to the grant of a franchise or permit or to other regulation by the City. Qwest provides the same telecommunications services in Portland as it does in all its other service areas. Qwest has not been able to identify a single telecommunications service which Portland's regulations or requirements have prohibited it or had the effect of prohibiting it from providing to its customers.

Since at least 1932, Qwest has operated under terms and conditions substantially similar to those which it now argues "prohibit" its offering of telecommunications services. In 1932 the City Council issued a permit to the Pacific Telephone and Telegraph Company for use of city property. When Qwest Corporation acquired US West Communications, it succeeded to US West's rights and responsibilities under the 1932 permit.

The 1932 permit was revocable by the City on 180 days notice. In December, 2000, the City Council notified Qwest that the permit was being terminated. The parties entered into negotiations for a franchise and were unable to agree on terms, at least in part because the parties disagreed as to the impact of the Telecommunications Act of 1996 on the City's right to charge for use of the rights-of-way and to require Qwest to pay certain taxes. In recognition of this dispute, and to allow Qwest to continue operating in city streets while discussions continued, Portland issued Qwest a Temporary Revocable Permit on July 5, 2001, containing a provision reserving Qwest's right to contest the validity of Temporary Revocable Permit, and Portland's charter and code provisions under

the Telecommunications Act. The Temporary Revocable Permit was accepted by Qwest. Qwest's current authority to use city streets is based upon the Temporary Revocable Permit.

Qwest's use of Portland's rights-of-way is extensive, pervasive, and necessarily causes damage to City streets. Between July 1, 2000 and June 30, 2001, Qwest installed 114 underground structures and 185 poles, and excavated approximately 192,000 square feet of street area, equal to twenty linear blocks of street surface. Qwest put its wires, batteries, generators, electronic equipment, concrete vaults and manholes, conduit banks, poles, and multiple other large and heavy objects under, on and over the right-of-way. Qwest's installation and repair of its facilities within the City's right-of-way increases the costs to the City of maintaining this asset, disrupts traffic, adversely affects abutting residences and businesses, and increases the complexities of use of the right-of-way by other users. Qwest's occupancy in general shortens the life of city street surfaces, delays traffic, blocks access to local businesses or residential areas, and damages other facilities in the public right-of-way.

In Fiscal Year 2001, the City budgeted $28.7 million in capital improvements related to rights-of-way and $41 million to maintain, repair and manage the rights-of-way. Qwest's utility license fee payments for FY2000-01 totaled $6.16 million, approximately 12.2 percent of the utility license fee payments received by the City during this fiscal year.

3. Proceedings Below

Even though it could not identify a single telecommunications service that the City of Portland's regulations or requirements prohibited or had the effect of prohibiting its ability to provide, Qwest brought this action in the United States District Court for the District of Oregon to challenge the validity of Portland's fees and other requirements. Qwest asserted jurisdiction under 28 U.S.C. §§ 1331 and 1337. Qwest alleged that certain State tax code provisions, Portland's Charter, provisions of Portland's tax code and the Temporary Revocable Permit violated the Telecommunications Act, 47 U.S.C. § 253. Qwest also sought relief under 42 U.S.C. § 1983.

Qwest moved for summary judgment. Portland filed a cross-motion for summary judgment. In addition to its Section 253(a) arguments, the City argued that the provisions Qwest challenged were protected from preemption by 47 U.S.C. §§ 253(b) and (c), and by Section 601(c) of the Telecommunications Act. The City presented evidence that Qwest had been providing service and was continuing to provide service under the terms and conditions to which Qwest objects. The City also showed that Qwest provides the same telecommunications services in Portland as it does in all its other service areas. Qwest did not identify a single telecommunications service which Portland's regulations or requirements prohibited or had the effect of prohibiting Qwest from providing, past, present, or in the future. During discovery, the company admitted that it would require speculation to say whether the conditions established by Portland had any prohibitory effect.

While the cross-motions were pending, several Oregon cities were permitted to intervene, and cross-motions for

summary judgment were filed by Qwest and the intervenors. Intervenors also presented evidence that there was no prohibition or effective prohibition. Notwithstanding the facts presented by the City and intervenors, Qwest chose not to present facts to support a claim that it (or anyone else) had been, was being, or would be prohibited or effectively prohibited from providing any service.

Based upon the record before it, the district court agreed with the cities that, as a factual matter, there had been no prohibition or effective prohibition under Section 253(a), and that this alone required dismissal of the case. The District Court's opinion is reported as *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002). Qwest argued that the use of the term "may" in 253(a) meant that a local law could be preempted merely if it "may" prohibit entry. The district court said:

"The statute actually provides that no local requirements may:

> "(1) prohibit the ability to provide service, or
>
> "(2) have the effect of prohibiting the ability to provide service.
>
> "A correct reading of the statute shows that Congress used the word 'may' as a synonym for 'is permitted to': 'No State or local statute or regulation, or other State or local legal requirement, may [i.e., is permitted to] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.' 47 U.S.C. § 253(a)."

200 F. Supp. 2d at 1255. "If the challenged requirements do not prohibit or have the effect of prohibiting the ability of

an entity to provide a telecommunications service, Section 253 does not preempt the requirements and the court's inquiry is complete." 200 F. Supp. 2d at 1255-56.

The court found in light of the undisputed facts that the challenged provisions were in any event protected from preemption by Section 253(c). Qwest's Section 1983 claim was dismissed.

Qwest appealed, challenging the district court's ruling with respect to the City's Charter, its ordinances and the Temporary Revocable Permit. Qwest did not appeal the district court's dismissal of its Section 1983 claims or the court's dismissal of its state law challenge. On appeal, the United States Court of Appeals for the Ninth Circuit reversed in part. The Ninth Circuit held that Qwest was not required to make an actual showing of a single telecommunications service that it was prohibited or effectively prohibited from providing. Rather, the Ninth Circuit held "that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted." *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004). The Ninth Circuit denied the petitions of Qwest and of the intervening cities for rehearing by orders entered December 17, 2004.

REASONS FOR GRANTING WRIT

The Ninth Circuit's decision is directly contrary to the plain language of the statute. It takes no account of the guidance provided by this Court's discussion of Section 253 or related provisions of the Telecommunications Act. What this Court has said in those cases does not support the Ninth Circuit's "may" approach. Further, extending

Section 253 to go beyond cases where there is a prohibition or effective prohibition, to cases where there "may" be a prohibition places the Ninth Circuit directly at odds with this Court's preemption jurisprudence, and in conflict with basic principles of standing and summary judgment. The decision directly conflicts with FCC precedent.

The question of whether Congress intended to preempt state and local law in the absence of a finding of direct or effective prohibition is an important one that has not been, but should be, decided by this Court. It implicates the rights and responsibilities of every telecommunications provider and every municipality in the country. As a practical matter, the decision makes it difficult if not impossible for a State or city to develop a rational way to manage a franchising process and public rights-of-way, since legality turns not on actual effects (in this case, effects that are indisputably pro-competitive) but on what "*may*" occur. This inevitably places the courts in a position of preempting local laws by what amounts to guesswork.

Did Congress really intend to displace what otherwise was the traditional authority of the States and of local governments, in the absence of an actual showing of prohibitive effect? Put otherwise, should traditional State and local roles be displaced on the basis of hypothetical or theoretical conjuring of potential impacts from state and local regulations? The answer, contrary to what the Ninth Circuit has held, must be no.

1. The Ninth Circuit Has Judicially Amended The Statute

Congress preempted state and local regulations or laws that "prohibit or have the effect of prohibiting the

ability of any entity to provide" telecommunications services. 47 U.S.C. § 253(a). The words are not difficult to understand.

The Ninth Circuit's decision effectively amends the statute to read:

> "No State or local *government shall enact or enforce any* statute or regulation, or other State or local legal requirement *which might* prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

That is not what Congress said, and that is not what Congress meant. The district court got it right when it said:

> "The statute actually provides that no local requirements may:
>
> "(1) prohibit the ability to provide service, or
>
> "(2) have the effect of prohibiting the ability to provide service.
>
> "A correct reading of the statute shows that Congress used the word 'may' as a synonym for 'is permitted to': 'No State or local statute or regulation, or other State or local legal requirement, may [i.e., is permitted to] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.' 47 U.S.C. § 253(a)."

200 F. Supp. 2d at 1255. "If the challenged requirements do not prohibit or have the effect of prohibiting the ability of an entity to provide a telecommunications service, § 253

does not preempt the requirements and the court's inquiry is complete." 200 F. Supp. 2d at 1255-56.

This Court should review the Ninth Circuit decision to correct its fundamentally flawed reading of the clear words of the Telecommunications Act of 1996.

2. The Decision Below Is Inconsistent With What This Court Has Said About The Telecommunications Act.

Although this Court has not yet specifically addressed the question presented here, it has given guidance as to the meaning of Section 253(a), and the Ninth Circuit's interpretation conflicts with what this Court has said. In *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S. Ct. 1555, 158 L. Ed. 2d 291 (2004), this Court held that Section 253(a) does not preempt State laws that expressly prohibit the State's own municipalities from providing telecommunication services. In the course of doing so, the Court attempted to give "some understanding of what § 253 means when it describes subjects of its preemption as laws or regulations that prohibit, expressly or in effect, 'the ability of any entity' to provide telecommunications." 541 U.S. at ___, 124 S. Ct. at 1562. As the Court noted, "[t]he reference to 'ability' complicates things." *Id.* But the Court cautioned against "read[ing] out of § 253 the words 'or ha[s] the effect of prohibiting,' *by which Congress signaled its willingness to preempt laws that produce the unwanted effect*, even if they do not advertise their prohibitory agenda on their faces." 541 U.S. at ___, 124 S. Ct. at 1565 (emphasis added). Nothing in *Nixon* or in the language of the statute itself lends any support to the reading that Section 253 preempts any regulation or requirement that does not actually produce an unwanted

effect, *i.e.*, that does not actually "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

The Ninth Circuit has ignored this Court's teaching in *Nixon* by holding that local regulations and requirements can be preempted even if the challenged regulations and requirements never "produced the unwanted effect." The Ninth Circuit impermissibly allowed Qwest to challenge Portland's regulations and requirements even though it was uncontroverted that, in this case, there was no prohibition or effective prohibition of any telecommunications service at all, past, present or future.

The Ninth Circuit's holding is similarly at odds with *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). In that case, this Court interpreted a similar provision in the Telecommunications Act, 47 U.S.C. § 251(d)(2)(B), that prohibits certain actions that "impair the ability of the telecommunications carrier . . . to provide the services that it seeks to offer." The Court held that a mere increase in a carrier's cost of doing business or some additional difficulty in conducting business did not constitute an "impairment" of the carrier's ability to provide service, because that "is simply not in accord with the ordinary and fair meaning of those terms." 525 U.S. at 389. If an "impairment" under Section 251(d)(2)(B) requires more than a demonstration of increased cost or additional difficulty, then a "prohibition" under Section 253(a) surely requires more than a hypothetical argument or conjecture that the regulation or requirement conceivably "may" inhibit an entity's ability to provide an unspecified telecommunications service.

3. The Ninth Circuit Has Departed From This Court's Preemption Jurisprudence.

In *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), this Court said that we "must assume" that Congress does not "exercise lightly" its "extraordinary power" to "impose its will on the States" or to "legislate in areas traditionally regulated by the States." Consequently, a federal statute only preempts State and local regulations if the federal statute contains a "plain statement" of Congress' intent to alter the usual constitutional balance between federal and state autonomy. *Id.* at 460-61. Relying on *Gregory*, this Court, in *Nixon v. Missouri Municipal League*, 541 U.S. at ___, 124 S. Ct. at 1566, concluded that "neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms."

By the same token, "neither statutory structure nor legislative history" – let alone proper application of simple English syntax – permits the Ninth Circuit's reading of the statute. In fact, in Section 601 of the Telecommunications Act, Congress expressly barred any implied extension of the Act's preemptive effect.

Congress understood that, in enacting the Telecommunications Act, it was exercising its power to impose its will upon the States and to legislate in areas traditionally regulated by the States. Congress memorialized its intent to minimize that intrusion through Section 601 of the Act, in which it said, "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." The preemptive language of Section 253(a) on its face demonstrates that

Congress intended to preempt only those local requirements that actually "prohibit or have the effect of prohibiting" the provision of telecommunications services. By the plain language of the statute, an entity challenging local regulations or requirements must make a showing that those regulations or requirements either explicitly prohibit, or have the effect of prohibiting, the provision of a telecommunications service. There is no other linguistically permissible reading of Section 253(a), as the district court correctly held.

Even if the Ninth Circuit's broad reading of the preemptive effect of Section 253(a) were linguistically possible, it is not legally permissible. *Gregory* requires that preemptive provisions be read narrowly, not broadly. When it held that Qwest was not "required to make an actual showing of 'a single telecommunications service that it . . . is effectively prohibited from providing'" because Section 253 preempts "regulations that *may* have the effect of prohibiting the provision of telecommunications services," 385 F.3d at 1241, the Ninth Circuit failed to exercise the restraint required by *Gregory*.

4. The Ninth Circuit's Decision Is Inconsistent With This Court's Cases On Standing And Summary Judgment.

The Ninth Circuit's decision permits Qwest to pursue this case even though it never has shown that it has suffered or will suffer any injury. That effect is inconsistent with basic principles of standing. Standing requires that, in order to maintain an action, Qwest must show a "particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 221 (1974). "[C]oncrete injury is an

'indispensable element' of any claim." *Id.* Here, Qwest itself concedes that any effect of the challenged regulations and requirements is entirely speculative. The Ninth Circuit's decision invites Qwest and other providers to sue municipalities even if they can allege no "concrete injury." The Ninth Circuit has exceeded the limits of judicial authority this Court has so carefully delineated.

The problem is compounded if the Ninth Circuit's decision is read to allow Qwest to challenge Portland's provisions based, not on any injury to itself, but on supposed injury to others. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). Constitutional rights are personal, and may not be asserted vicariously. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The Ninth Circuit's decision ignores these basic principles of standing.

The Ninth Circuit's ruling turns this Court's summary judgment precedents on their heads. The Ninth Circuit allows Qwest and other telecommunications providers to survive motions for summary judgment despite bringing forth no evidence establishing the elements of the claims on which they bear the burden of proof at trial.

The burden of demonstrating preemption is on the party who asserts it. *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Telecommunications providers asserting the preemption of local government regulations therefore bear the burden of proving that the Telecommunications Act preempts local regulation. The Telecommunications Act does not completely preempt all state and local

regulations. *See, City of Rome, New York v. Verizon Communications Inc.*, 362 F.3d 168 (2nd Cir. 2004). Local regulations are preempted only to the extent they conflict with Congress' purpose of rapid deployment of telecommunications services. Determining whether local regulations *conflict* with the Telecommunications Act and its purpose of rapid deployment necessarily requires a *factual* inquiry.

The burden of proof in this factual inquiry rests with the party asserting preemption, in this case Qwest. *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241 (3d Cir. 2002) (party seeking preemption bears burden of showing that regulation prohibits or effectively prohibits the provision of telecommunications service). To meet this burden, telecommunications providers, including Qwest, must come forward with facts establishing that local regulations have the effect of prohibiting the provision of telecommunications service. *Id. See also, BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2000) (if party asserting preemption fails to make the threshold showing of a violation of Section 253(a), the safe harbor provisions need not be reached).

Because "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986), parties filing or defending against a motion for summary judgment must supply the court with facts supporting the elements of their claims to survive the process. Where evidence presented by the nonmoving party in response to a summary judgment motion is insufficient "to establish . . . an element essential" to its case, the moving party is "entitled to summary judgment." *Celotex*, 477 U.S. at 322-23. This rule is essential to the

rational conduct of civil litigation, preventing one party from exhausting the resources of the courts and its opponents based on claims that are speculative and undefined.

Here, Portland presented facts showing that there had been no prohibition or effective prohibition of any telecommunications services. Qwest presented no material facts to the contrary, and admitted it could not do so. To preserve its case, in the face of Portland's motion for summary judgment, Qwest was at least required to come forward and to identify *some* cognizable prohibition, and it did not and could not do so. The text and legislative history of Section 253(a) do not indicate that Congress intended to change either preemption or summary judgment jurisprudence when it enacted the Telecommunications Act of 1996. The Ninth Circuit's declaration that an actual showing is not required is therefore in conflict with this Court's precedents. In addition, as demonstrated above, the Ninth Circuit's ruling is in conflict with the rulings of the Third and Eleventh Circuit with respect to the requirement that telecommunications providers prove a violation of Section 253(a).

5. The Ninth Circuit's Construction Conflicts With That Of The Federal Communications Commission.

The FCC, on several occasions, has announced its interpretation of the scope of Section 253(a) preemption, and consistently has reiterated that preemption requires a factual showing that the challenged requirements actually prohibit an entity from providing a specified service.

On November 17, 1998, the FCC issued its "Suggested Guidelines for Petitions for Ruling under Section 253 of the

Communications Act." This document is available on-line at http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1998/fcc98295.txt. *See also,* 13 F.C.C.R. 22970. In these guidelines, the Commission directs petitioners to identify the "specific telecommunications service or services [that] the petitioner [is] prohibited or effectively prohibited from providing." Petitioners are further asked to explain "the factual circumstances that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services." Petitioners are directed to "describe with particularity how the challenged statute, regulation, ordinance, or legal requirement has such an effect."

The FCC's decisions are consistent with these guidelines. *In re State of Minnesota, Petition for a Declaratory Ruling*, 14 F.C.C.R. 21697 (1999); *In re California Payphone Association, Petition for Preemption*, 12 F.C.C.R. 14191 (1997).

In *California Payphone*, the Commission considered an ordinance that strictly limited where payphones could be located in the community of Huntington Park, California. Among other things, the ordinance allowed outdoor payphones only if they were in public rights-of-way, and only if they were under contract with the City of Huntington Park. Huntington Park had approved only one contract, with the incumbent telephone provider. The FCC declined to order the ordinance or the city's contract preempted. In doing so, the FCC explained its test for preemption:

> [T]he City's contracting conduct would have to *actually* prohibit or *effectively prohibit* the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. . . . [T]he present

> record does not permit us to conclude that the City's contracting conduct *has caused such results.*

12 F.C.C.R. at 14209 (emphasis added).

In *Minnesota*, the FCC declined to declare that a proposed right of way access agreement which granted exclusive rights to one telecommunications provider "is consistent with section 253 of the Telecommunications Act." 14 F.C.C.R. at 21699. Notably, however, the FCC similarly declined to enter an order preempting the Agreement because "depending on how the Agreement is implemented, the potential competitive effects that fuel our concerns may be largely or wholly ameliorated." *Id.* at 21730. The Commission ruled "that our consideration of any requests for preemption would be aided by supplemental information concerning the practical effect of this Agreement," *id.*, and invited the parties to submit additional information.

It is not surprising that the FCC has so interpreted Section 253(a), as that is the only interpretation reasonable from the face of the statute. The Telecommunications Act does not preempt state or local regulations or requirements merely because they may, might or hypothetically could prohibit provision of telecommunications services. Congress preempted only such requirements as actually foreclose "an entity or class of entities from providing a particular service in a particular area." *California Payphone*, 12 F.C.C.R. at 14205.

The Ninth Circuit simply ignored the FCC's interpretation of Section 253(a). Even if the actual words of the statute could bear the Ninth Circuit's contorted interpretation, *Meyer v. Holley*, 537 U.S. 280, 281 (2003) and

Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) required the court to give deference to the agency's reasonable determination that a local regulation or requirement is not preempted under Section 253(a) unless, in practice, it either actually prohibits or actually has the effect of prohibiting an entity from providing a particular service. Since it is undisputed that Portland's regulations and requirements had no such effect on Qwest, the district court correctly granted the City's motion for summary judgment, and the Ninth Circuit erred in misconstruing the statute and reversing that summary judgment.

CONCLUSION

This case presents an important federal question that has not been directly addressed by this Court, but which should be. The Ninth Circuit has decided this question in a way that conflicts with this Court's teachings regarding the substantive interpretation of the statute, and regarding preemption, summary judgment and standing, as well as with the interpretation of the statute by the federal agency charged with its administration. This Court should grant the petition for a writ of certiorari, and should reverse.

Respectfully submitted,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QWEST CORPORATION, a Colorado corporation,
Plaintiff-Appellant,

v.

CITY OF PORTLAND, an Oregon municipal corporation,
Defendant-Appellee,

CITY OF HAPPY VALLEY; CITY OF KEIZER; CITY OF NORTH PLAINS; CITY OF PENDLETON; CITY OF REDMOND; CITY OF SALEM; CITY OF EUGENE; CITY OF SPRINGFIELD; CITY OF ASHLAND,
Defendants-Intervenors-Appellees.

No. 02-35473
D.C. No.
CV-01-01005-JE
OPINION

Appeal from the United States District Court
for the District of Oregon
John Jelderks, Magistrate Judge, Presiding

Argued and Submitted
November 3, 2003 – Portland, Oregon

Filed October 12, 2004

Before: Arthur L. Alarcón, Warren J. Ferguson, and Johnnie B. Rawlinson, Ciruit Judges.

Opinion by Judge Rawlinson;
Concurrence by Judge Ferguson

COUNSEL

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William F. Gary, Jerome Lidz, Linda J. Kessel, Harrang Long Gary Rudnick P.C., Eugene, Oregon, for intervenor city of Eugene.

OPINION

RAWLINSON, Circuit Judge:

Qwest Corporation (Qwest), a telecommunication provider, appeals the district court's summary judgment in favor of the City of Portland and other Oregon cities (Cities), who intervened in the action. Qwest contends that the Federal Telecommunications Act of 1996 (FTA), 47 U.S.C. § 253, preempts the municipal ordinances pursuant to which the franchise fees were assessed. The district court ruled that the Cities' ordinances and various franchise agreements were not preempted by the FTA.[1] The district court also determined that the revenue-based fees

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[1] The parties consented to resolution by a magistrate judge.

imposed on the telecommunication providers by the Cities were valid under the FTA. Because the district court failed to conduct an individualized § 253 preemption analysis for each city's ordinances, and misapplied our holding in *City of Auburn v. Qwest,* 260 F.3d 1160 (9th Cir. 2001), we must remand the case to the district court for additional consideration. Because the district court correctly concluded that Qwest's challenge to the Cities' gross revenue-based fees was barred by claim and issue preclusion, that ruling is affirmed.

I.

BACKGROUND

In 1932, the Portland City Council issued a revocable permit to the Pacific Telephone and Telegraph Company to use the city's public rights-of-way to provide telecommunications services. In 1961, Pacific Telephone and Telegraph Company transferred the permit to Pacific Northwest Bell Telephone Company (PNWB). U.S. West Communications succeeded to PNWB's interests, and Qwest eventually acquired U.S. West.[2]

In 1989, Qwest lobbied for adoption of a separate privilege tax for incumbent local telecommunications carriers in exchange for their use of the rights-of-way. The Oregon legislature subsequently enacted ORS §§ 221.505 to 221.515, which authorized Oregon cities to assess incumbent local telecommunications carriers fees of up to 7% of gross revenues. In response to this legislation, the

[2] Reference to Qwest in this opinion encompasses Qwest's predecessors, including U.S. West and PNWB.

Cities entered into nonexclusive agreements with Qwest, allowing Qwest to use the public rights-of-way. In exchange for this privilege, Qwest agreed to pay the Cities a fee equal to 7% of gross revenues earned within the Cities' boundaries.[3]

Some ten years later, the city of Portland notified Qwest that it was revoking Qwest's long-standing permit to use its public right-of-way. The parties entered into unfruitful negotiations for a new permit. In the interim, the city of Portland issued Qwest a temporary revocable permit (TRP) allowing Qwest to continue to use its public right-of-way.

Qwest brought this action seeking a declaration that Portland's franchise and telecommunications ordinances are invalid under § 253 of the FTA. Nine other cities intervened and filed counterclaims seeking past-due franchise fees. Following the filing of cross-motions for summary judgment, the district court granted summary judgment to all ten cities, holding that Qwest had failed to show that the Cities' revenue-based right-of-way fees, or other franchise requirements, prohibited or had the effect of prohibiting Qwest's provision of telecommunication services under § 253. *Qwest Corp. v. City of Portland,* 200 F.Supp.2d 1250, 1253-54, 1256-59 (D. Or. 2002). The court also ruled that the FTA did not categorically prohibit cities from basing public rights-of-way fees on a company's gross revenues, rather than on actual costs for use of local rights-of-way. *Id.* at 1256-57. Finally, the court determined that Qwest's action against the city of Eugene was barred by the doctrine of claim preclusion and that issue preclusion

[3] The City of North Plains imposed a 4% revenue-based fee.

barred Qwest from challenging the other Cities' revenue-based right-of-way fees. *Id.* at 1257-58. Even if the Cities' revenue-based fees were presumptively preempted under § 253(a), the district court concluded that the fees would still be valid under the safe-harbor provision of § 253(c), and any preempted provisions could be severed under Oregon law. *Id.* at 1258-59.

II.

STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *See PLANS, Inc. v. Sacramento City Unified School Dist.*, 319 F.3d 504, 507 (9th Cir. 2003). Viewing the facts in the light most favorable to the non-moving party, we must determine whether a genuine issue of material fact exists, and whether the district court applied the law correctly. *See Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004).

III.

DISCUSSION

To resolve this case, we must interpret the FTA, 47 U.S.C. § 253, which provides in part:

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis

> and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253.

Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that "may . . . have the effect of prohibiting the provision of such services." 47 U.S.C. § 253(a). In *City of Auburn,* we considered whether § 253 preempted local ordinances that established permit processes for telecommunications providers. In discussing § 253 preemption, we noted that "[t]he preemption is virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena." *City of Auburn,* 260 F.3d at 1175. Accordingly, cities have "a very limited and proscribed role in the regulation of telecommunications." *Id.* (citation omitted).

To determine whether preemption exists under § 253(a), it is necessary to analyze whether the regulatory scheme "in combination" has "the effect of prohibiting the provision of telecommunications services." *City of Auburn,* 260 F.3d at 1176. In conducting this analysis in *City of Auburn,* we examined such factors as the nature of the franchise application process, the requirements to obtain a franchise, the threat of penalties for failure to obtain a franchise, and the discretion the city reserves to grant, deny, or revoke a franchise. *Id.* ("And, the ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed . . . "). In *City of Auburn,* we held that the combination of features present in the regulatory scheme created "a substantial and unlawful barrier to entry into and participation in the . . . telecommunications markets." *Id.*

Qwest challenges the Cities' ordinances in two ways. First, Qwest argues that the Cities' ordinances are similar in scope and substance to those preempted in *City of Auburn.* As was the case in *City of Auburn,* Qwest contends that these ordinances, taken as a whole, are preempted by § 253. Qwest also makes a more narrow challenge, asserting that § 253 prohibits the Cities from basing right-of-way fees on Qwest's gross revenues. In support of this argument, Qwest posits that § 253 allows local officials to recover only the costs of the use of the right-of-way, rather than to assess fees based on the gross revenues of the telecommunication providers. Each challenge will be discussed separately.

A. *General Franchise Requirements*

In analyzing the Cities' franchise requirements generally under § 253(a), the district court ruled that the "franchise agreements and ordinances at issue here do not give the Cities unfettered discretion to deny telecommunications franchisees . . ." *City of Portland,* 200 F.Supp.2d at 1256. The court determined that "unfettered discretion" did not exist because some franchise agreements allowed the parties to terminate on 180 days' notice. *Id.* The court concluded that the requirement that telecommunications service providers submit information about revenues and ownership did not create a barrier to entry into the market or have the effect of prohibiting telecommunications services. *Id.*

The district court's ruling raises several concerns. As an initial matter, we note that there was no individualized analysis of each Cities' challenged ordinances. There are ten Oregon cities involved in this litigation, and each city has unique ordinances that are being challenged by Qwest. The district court's general conclusion that the Cities' franchise agreements and ordinances were not preempted by § 253 is not conducive to effective review on appeal. *See Holly D. v. Cal. Institute of Tech.,* 339 F.3d 1158, 1180 (9th Cir. 2003); *see also Shawmut Bank, N.A. v. Kress Associates,* 33 F.3d 1477, 1504 (9th Cir. 1994) ("If a trial court's findings of fact are such that it is impossible to determine whether the district court properly applied the law to the facts, the appellate court may remand for more specific findings.") (citation, alteration, and internal quotation marks omitted). We therefore remand for the district court to delineate its findings with regard to each individual city's challenged franchise requirements.

We are also concerned about the district court's application of our ruling in *City of Auburn,* where we stated that "Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may have the effect of prohibiting the provision of such services." 260 F.3d at 1175 (citation, alteration, and internal quotation marks omitted); *see also Qwest Corp. v. City of Santa Fe*, Nos. 02-2258, 02-2269, 2004 WL 1879940, *15 n. 9 (10th Cir. August 24, 2004) ("Section 253(a) bars any legal requirement which may have the effect of prohibiting the ability of an entity to provide telecommunications service."). The district court characterized our interpretation of § 253(a) as misreading "the plain wording of the statute." *City of Portland,* 200 F.Supp.2d at 1255. The district court reasoned that our interpretation of § 253(a) "implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those local requirements that *may* have that effect." *Id.* The district court disagreed with our interpretation and concluded that § 253(a) preempts challenged requirements only if the requirement "prohibit[s] or [has] the effect of prohibiting the ability of an entity to provide a telecommunications service." *Id.* at 1255-56. Applying its interpretation of § 253(a), the district court concluded that Qwest had failed to demonstrate that the "Cities' revenue-based right-of-way fees, or other franchise requirements, have barred Qwest's entry into any markets." *Id.* at 1256. The district court noted that "Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements." *Id.* (citation omitted).

We do not agree that Qwest was required to make an actual showing of "a single telecommunications service that it . . . is effectively prohibited from providing." We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling. *See Hart v. Massanari,* 266 F.3d 1155, 1171, 1175 (9th Cir. 2001). In addition, the district court failed to take into consideration the cumulative effect of the Cities' regulatory schemes. *See City of Auburn,* 260 F.3d at 1176 ("The ordinances at issue in the present case include several features that, *in combination,* have the effect of prohibiting the provision of telecommunications service.") (emphasis added). The district court's discussion of the *Auburn* factors was somewhat cursory, leaving us uninformed as to the rationale underlying the court's conclusion, other than its misguided attempt to avoid adhering to binding precedent.

Finally, and perhaps most importantly, the district court failed to draw a distinction between the Cities' ordinances that are telecommunications-specific and those that are not. In *City of Auburn,* each of the challenged ordinances specifically addressed the provision of telecommunications services and was adopted after the enactment of the FTA in 1996.[4] 260 F.3d at 1170. Under

[4] In fact, an examination of the cases discussing preemption under § 253 reflects that telecommunications-specific ordinances enacted after 1996 are generally the subject of review. *See e.g. TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 71 (2d Cir. 2002) (telecommunications-specific ordinance enacted in 1997); *BellSouth Telecom., Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1175 (11th Cir. 2001) (telecommunications-specific ordinances enacted in 1997); *New Jersey Payphone Ass'n., Inc. v. Town of West New York,* 299 F.3d 235, 237 (3d Cir. 2002) (telecommunications-specific ordinance enacted in 2000); *Qwest Comm.*

(Continued on following page)

each ordinance challenged in *City of Auburn,* any telecommunications service provider that sought to operate in the city was forced to apply for a franchise. *Id.* Companies issued a telecommunications franchise were then subject to strict regulations and reporting requirements, and each city expressly reserved the right to exercise its discretion to "grant, deny, or revoke" the telecommunications franchise. *Id.*

In this case, Qwest's challenge to the Cities' ordinances is not nearly as narrow and defined. Qwest's challenge to Portland's ordinances is a prime example. Portland's franchising process is not the result of a single, uniform ordinance regulating telecommunications providers. Rather, the city's franchising process includes a number of provisions adopted over the course of many years and are applicable to utilities generally. Qwest challenges Portland's business license requirements (City Code Chapters 7.12 and 7.14), general franchise requirements that apply to all public utilities (City Charter sections 10-107 and 10-210(d)), and the city's TRP with Qwest (Ordinance No. 175757). Qwest makes a similar challenge to several of Eugene's ordinances.[5]

Corp. v. City of Berkeley, 255 F.Supp.2d 1116, 1118 (N.D. Cal. 2003) (telecommunications-specific ordinance enacted in 2000); *Qwest Corp. v. City of Santa Fe,* 224 F.Supp.2d 1305, 1309 (D. N.M. 2002) (telecommunications-specific ordinance enacted in 1998).

[5] Qwest challenges at least six general Eugene Code provisions that are not telecommunications-specific. *See* Eugene Mun.Code § 3.015 – authorizing the city manager to adopt rules for the administration of city business licenses; Eugene Mun.Code § 3.020 – providing general application procedures for business licensees; Eugene Mun.Code § 3.025 – setting forth legal requirements for license approval; Eugene Mun.Code § 3.045 – authorizing the city to impose an administrative civil penalty for violations of Chapter 3 of the code; Eugene Mun.Code

(Continued on following page)

We doubt whether *City of Auburn* can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process. Based on the record before us, there is no indication that Portland or the other Cities, with the exception of Ashland, Eugene, and Springfield, have passed ordinances that are specific to the telecommunications process and apply to all telecommunications providers attempting to enter the market.[6] Therefore, to the extent that Qwest challenges these ordinance provisions, it is questionable whether § 253 even applies.

In sum, because the district court failed to conduct an individualized preemption analysis of each city's ordinances, and also misapplied our holding in *City of Auburn*, we must remand the case to the district court for additional consideration.[7]

B. Right-of-Way Fees Based on Gross Revenues

In addition to Qwest's broad challenge to the Cities' ordinances generally, Qwest also advances a more narrow challenge to the Cities' right-of-way fees, based on the provisions of § 253(c). Section 253 retains the authority of

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§ 3.050 – authorizing the city to deny or revoke a license if the licensee violates relevant code provisions or conditions.

[6] Ashland, Eugene, and Springfield have enacted telecommunications-specific ordinances post-1996, and each city's telecommunications ordinance regulates the franchise process. Qwest has not challenged Eugene's telecommunications ordinance (Eugene Ordinance 20083) in this appeal.

[7] If the district court finds that any of the Cities' ordinances are preempted by § 253(a), it must also consider whether the preempted ordinance provisions fall within the savings clause of § 253(c). *See City of Auburn*, 260 F.3d at 1177.

a state or municipality to impose a fee "for use of public rights-of-way." 47 U.S.C. § 253(c). For a gross revenue fee to fall within § 253(c), it must constitute "fair and reasonable compensation." *Id.* Qwest argues that to be "fair and reasonable" such "compensation" must be limited to cost recovery. Qwest predicates its argument on the following language from *City of Auburn*: "Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right-of-way, as required under the Telecom Act." 260 F.3d at 1176. It is far from clear that the quoted language was intended to address the precise issue we now consider: whether a gross revenue fee imposed pursuant to § 253(c) must be cost-based. We need not decide this matter, because the district court rejected Qwest's challenge to the Cities' gross revenue-based fees on the basis of claim and issue preclusion. We agree.

In previous litigation, Qwest's predecessor U.S. West challenged the validity of Eugene's telecommunications ordinance, including § 3.415, the portion of the ordinance containing the seven percent gross revenue-based right-of-way fee.[8] *See U.S. West Communications, Inc. v. City of Eugene,* 37 P.3d 1001, 1002 (Or.Ct.App. 2001) (stating that U.S. West challenged "the validity of the ordinance and, in

[8] In light of Qwest's status as successor to U.S. West, the parties in this case are the same as those in the earlier case. *See Stevens v. Horton,* 984 P.2d 868, 872-73 (Or.App. 1999). ("Nonparties to prior adjudications whose rights can realistically be said to have been protected in those proceedings tend to fall into one of three categories: (1) those who control an action though not a party to it; (2) those whose interests are represented by a party to the action; and (3) *successors in interest to those having derivative claims.*") (emphasis added) (citations omitted); *see also Russell v. SunAmerica Securities, Inc.,* 962 F.2d 1169, 1174 (5th Cir. 1992) (suggesting that a claim by a successor corporation is a derivative claim).

particular, the registration and [7%] licensing fee requirements"), *aff'd in part and vacated in part*, 81 P.3d 702 (Or. 2003) (en banc). The Oregon Court of Appeals explicitly ruled that the challenged ordinance was not preempted by 47 U.S.C. § 253(a). *Id.* at 1004.[9] The district court concluded that the Oregon Court of Appeals' ruling had a preclusive effect, barring further consideration of Qwest's challenge to the telecommunications fees.

Qwest now seeks to avoid application of claim preclusion, contending that it challenged only Ordinance 20083 (which included the 7% gross revenue fee) in *US West Communications,* and is now challenging other portions of Eugene's Municipal Code that were not part of Ordinance 20083.

Claim preclusion works to prevent a party who has litigated one action through to a final judgment from bringing another action against the adverse party when the second claim: 1) involves the same parties and the same facts as in the first action, 2) seeks an additional or alternative remedy, and 3) could have been raised in the first action. *See Secor Investments, LLC v. Anderegg,* 71 P.3d 538, 545 (Or.App. 2003).[10]

The elements of claim preclusion are met in this case as to Eugene's 7% gross revenue fee on telecommunications providers. The fact that Qwest's current challenge to

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[9] In so ruling, the Court of Appeals relied upon its prior decision in *AT & T Communications v. City of Eugene,* 35 P.3d 1029, 1032-34 (Or.App. 2001).

[10] In determining the preclusive effect of a state court judgment, we "must apply the [preclusion] rules of the state that rendered the underlying judgment." *Zamarripa v. City of Mesa,* 125 F.3d 792, 793 (9th Cir. 1997).

Eugene's Municipal Code is broader than its previous challenge does not change the reality that Eugene's 7% gross revenue fee was challenged in both cases. It is well settled that claim and issue preclusion apply to state court rulings on federal preemption issues. *See Morgan Stanley Mortgage Capital Inc. v. Insurance Comm'r,* 18 F.3d 790, 792-793 (9th Cir. 1994). The district court properly applied claim preclusion to bar Qwest's challenge to Eugene's revenue-based fee.

The doctrine of issue preclusion prevents Qwest from challenging the other Cities' revenue-based right-of-way fees. Issue preclusion bars relitigation of an issue in a subsequent proceeding if five requirements are satisfied: "(1) the issue in two proceedings is identical[;] (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding[;] (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue[;] (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding[;] and (5) the prior proceeding was the type of proceeding to which [a] court will give preclusive effect." *Durham v. City of Portland,* 45 P.3d 998, 1007 (Or.App. 2002) (citation omitted).

Qwest contends that issue preclusion should not apply to this case because the issue of the validity of the 7% revenue-based fee was not specifically raised and litigated in the prior proceedings. Qwest also asserts that *US West Communications* did not incorporate a factual adjudication regarding the revenue-based fee, but simply encompassed a decision on an abstract issue of law. Apparently, both arguments arise from the fact that *US West Communications* did not articulate explicit reasons for its conclusion that Eugene's telecommunications ordinance was not

preempted, but simply referred to its prior opinion in *AT & T Communications.* Qwest's argument is not persuasive.

In *US West Communications,* the court unambiguously stated that U.S. West was "challenging the validity of the ordinance and, in particular, the registration and licensing fee requirements." 37 P.3d at 1002. The court rejected the notion that Eugene's telecommunications ordinance was preempted by § 253(a) and referred to its decision in *AT & T Communications. See id.* at 1004. In other words, the court simply adopted the findings and conclusions previously articulated in *AT & T Communications. See id.* Thus, Qwest's assertion that the *US West Communications* holding represents a ruling on an abstract question of law is not compelling because in *US West Communications,* the court indisputably decided the validity of Eugene's gross revenue-based fee vis-a-vis the TCA by incorporating the holding of *AT & T Communications.*

Qwest also argues that applying issue preclusion in this case would be fundamentally unfair. It is true that, in certain situations, it is important for a court to consider whether the application of issue preclusion would result in fundamental unfairness. *See State Farm Fire and Cas. Co. v. Century Home Components, Inc.,* 550 P.2d 1185, 1191 (Or. 1976) ("There seems to be something fundamentally offensive about depriving a party of the opportunity to litigate the issue again when he has shown beyond a doubt that on another day he prevailed."). This is not one of those situations.

Qwest contends that the holding in *US West Communications* regarding the revenue-based fee is directly contrary to this court's holding in *City of Auburn,* and,

therefore, applying issue preclusion would foster a fundamentally unfair result. However, Qwest's position is not a fair reading of *City of Auburn,* which did not address the specific issue of whether a gross revenue-based fee imposed upon telecommunications providers must be cost-based. *US West Communications* and *City of Auburn* are not inconsistent determinations of the same issue. Accordingly, no unfairness would result if issue preclusion is applied in this case.

Finally, Qwest asserts that issue preclusion should not apply because the facts determined in *US West Communications* regarding Eugene's telecommunications ordinance are not identical to the facts applicable to Portland and the other intervenor cities in this case. However, this argument fails because factual distinctions among the Cities' ordinances is not a factor to be considered in determining issue preclusion. *See Durham,* 45 P.3d at 1007 (listing factors to be considered in determining if issue preclusion applies).

In sum, the validity of Eugene's revenue-based right-of-way fees was litigated in *US West Communications.* Qwest has not presented a persuasive argument against the application of issue preclusion in this case. Therefore, the Cities are entitled to rely on the doctrine of issue preclusion to avoid challenges to the Cities' revenue-based right-of-way fees.

IV.

CONCLUSION

Because the district court failed to conduct an individualized § 253 preemption analysis of each city's ordinances, and misapplied our ruling in *City of Auburn,* we

remand the case to the district court for additional consideration. The district court properly held that Qwest's challenge to the Cities' gross revenue-based fees was barred by claim and issue preclusion. Accordingly, the judgment of the district court is reversed and remanded as to the § 253 preemption claim and affirmed as to the revenue-based fees claim.

REVERSED in part, AFFIRMED in part and REMANDED. Each party will bear its costs on appeal.

FERGUSON, Circuit Judge, concurring specially:

I concur to remand this case to District Court for additional consideration as to whether each individual city ordinance at issue is preempted by § 253 of the Federal Telecommunications Act of 1996 (FTA). In so doing, however, the District Court must consider whether the Cities' ordinances in whole or in part survive preemption under the safe harbor provisions of the FTA, particularly § 253(c). *See City of Auburn v. Qwest*, 260 F.3d 1160, 1177 (9th Cir. 2001). The District Court must also determine whether individual provisions of a particular city ordinance that might be found to be preempted by § 253 of the FTA can be severed from the remaining provisions of the ordinance that might not be found to be preempted. *See Auburn*, 260 F.3d at 1180.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

QWEST CORPORATION, a Colorado corporation,

Plaintiff,

v.

CITY OF PORTLAND, an Oregon municipal corporation,

Defendant,

THE CITY OF ASHLAND, an Oregon municipal corporation; THE CITY OF HAPPY VALLEY, an Oregon municipal corporation; THE CITY OF KEIZER, an Oregon municipal corporation; THE CITY OF NORTH PLAINS, an Oregon municipal corporation; THE CITY OF PENDLETON, an Oregon municipal corporation; THE CITY OF REDMOND, an Oregon municipal corporation; THE CITY OF SALEM, an Oregon municipal corporation; THE CITY OF SPRINGFIELD, an Oregon municipal corporation,

Defendants in Intervention.

Civil No. 01-1005-JE.

OPINION AND ORDER

(Filed Mar. 22, 2002)

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JELDERKS, Magistrate Judge.

Plaintiff Qwest Corp. claims that the Federal Telecommunications Act of 1996, 47 U.S.C. § 253, prohibits Oregon cities from collecting a percentage of Qwest's revenues in exchange for Qwest's use of public rights of way. The defendants are the Cities of Ashland, Eugene, Happy Valley, Keizer, North Plains, Pendleton, Portland, Redmond, Salem, and Springfield (the Cities). The Cities counterclaim for past-due fees that Qwest refuses to pay pending resolution of this lawsuit.

The parties have filed cross-motions for summary judgment. I grant the Cities' motions and deny Qwest's motions.

BACKGROUND

For many years, Qwest and its predecessors[1] have used the Cities' public rights of way to provide telecommunications services. Qwest negotiated, and in some cases drafted, franchise agreements with the Cities. Under the current franchise agreements, Qwest has promised to pay each City 7% of gross revenues from telecommunications services in that City, in exchange for Qwest's use of public rights of way.[2]

In 1989, Qwest successfully lobbied for a state statute that allows Oregon cities to impose revenue-based "privilege taxes" of up to 7% on telecommunications carriers for use of the public rights of way. Or. Rev. Stat. § 221.515(1).[3] Only gross revenues from exchange access services are subject to the right-of-way privilege tax. Or. Rev. Stat. § 221.515(2).

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[1] In this opinion, "Qwest" also refers to Qwest's predecessors, including U.S. West Communications and Pacific Northwest Bell Telephone.

[2] The City of North Plains requires a 4% revenue-based fee.

[3] The statute provides in part:

> The council of every municipality in this state may levy and collect from every telecommunications carrier operating within the municipality and actually using the streets, alleys or highways, or all of them, in such municipality for other than travel, a privilege tax for the use of those streets, alleys or highways, or all of them, in such municipality in an amount which may not exceed seven percent of the gross revenues of the telecommunications carrier currently earned within the boundaries of the municipality. The privilege tax authorized in this section shall be for each year, or part of each year, that such telecommunications carrier operates within the municipality.

In April 2001, the Ninth Circuit issued the initial opinion in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied,* 122 S. Ct. 809 (2002). Based on its interpretation of the *City of Auburn* decision, Qwest brought this action and stopped paying revenue-based right-of-way fees to the Cities.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of an issue of material fact against the moving party. *Id.* at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. *Id.* at 630-31.

DISCUSSION

I. Preemption Under § 253

This case turns on the proper application of 47 U.S.C. § 253. Section 253, which is entitled, "Removal of barriers to entry," provides in relevant part:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

When applying § 253, the court must first determine whether the challenged ordinances or franchise requirements "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Even if local requirements do not expressly prohibit a telecommunications service, the requirements might be so burdensome that they effectively achieve the same result. *AT & T Communications of the Pac. Northwest, Inc. v. City of*

Eugene, 177 Or. App. 379, 408, 35 P.3d 1029, 1047 (2001) (*City of Eugene*). The burden is on Qwest to show that § 253(a) bars the challenged requirements. *New Jersey Payphone Ass'n, Inc. v. Town of West New York,* 130 F. Supp. 2d 631, 636 (D. N.J. 2001); *In re TCI Cablevision of Oakland County, Inc.,* 12 F.C.C.R. 21396, 21440 (1997), *quoted in City of Eugene,* 177 Or. App. at 408, 35 P.3d at 1047.

In its briefs and at oral argument, Qwest has relied on an incorrect, overly broad version of § 253(a)'s preemption test, which was unfortunately quoted in the *City of Auburn* opinion: "Section 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also those that "*may . . . have the effect of prohibiting*" the provision of such services.'" *City of Auburn,* 260 F.3d at 1175 (emphasis added; original ellipses) (quoting *Bell Atlantic-Maryland, Inc. v. Prince George's County,* 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated,* 212 F.3d 863 (4th Cir. 2000)). The quoted phrase simply misreads the plain wording of the statute, and implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those local requirements that *may* have that effect. That is not what the statute says. The statute actually provides that no local requirements may:

(1) prohibit the ability to provide service, or

(2) have the effect of prohibiting the ability to provide service.

A correct reading of the statute shows that Congress used the word "may" as a synonym for "is permitted to": "No

State or local statute or regulation, or other State or local legal requirement, may [i.e., is permitted to] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). The *City of Auburn* opinion elsewhere recites the preemption test correctly. *See, e.g.,* 260 F.3d at 1176 ("The ordinances . . . include several features that, in combination, have the effect of prohibiting the provision of telecommunication services.").

If the challenged requirements do not prohibit or have the effect of prohibiting the ability of an entity to provide a telecommunications service, § 253 does not preempt the requirements and the court's inquiry is complete. *City of Eugene,* 177 Or. App. at 407, 35 P.3d at 1046. If, and only if, a requirement does prohibit or has the effect of prohibiting the ability to provide a telecommunications service, the court then must determine whether the requirement is protected by the safe-harbor provisions of § 253(b) or (c). *City of Auburn,* 260 F.3d at 1177.

II. The Cities' Requirements Do Not Have the Effect of Prohibiting Qwest's Ability to Provide Any Telecommunications Service

Qwest has not shown that the Cities' revenue-based right-of-way fees, or other franchise requirements, have barred Qwest's entry into any markets. Qwest has managed to provide telecommunications services in the Cities for many years while laboring under the allegedly prohibitive right-of-way fees and other requirements. *See City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.,* Civ. No. 98-2128, 2000 WL 198104, at *5 (N.D. Tex. Feb.17, 2000) ("the ordinances in question could not have acted as a barrier to entry in violation of § 253 because MFS and

Brooks were already in the market"); *City of Eugene,* 177 Or. App. at 410, 35 P.3d at 1048 ("it is not easy to understand how being required to satisfy a requirement that the companies . . . already have satisfied constitutes an effective prohibition of their ability to provide services"). Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements. *See BellSouth Telecommunications, Inc. v. City of Mobile,* 171 F. Supp. 2d 1261, 1281 (S.D. Ala. 2001) (§ 253(a) "speaks in terms of prohibition, not in terms of minor delays" that may be incurred in obtaining permits).

The franchise agreements and ordinances at issue here do not give the Cities unfettered discretion to deny telecommunications franchises, unlike the requirements struck down as barriers to entry in *City of Auburn.* 260 F.3d at 1176. Instead, the franchise agreements allow either party to terminate on 180 days' notice. As the court noted in *City of Auburn,* local authorities may retain the power to cancel or deny a franchise without necessarily running afoul of § 253(a). *Id.,* 260 F.3d at 1176 n.11 (citing *TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir. 2000) (*City of Dearborn*)).

Qwest also challenges the requirements imposed by some of the Cities that telecommunications service providers submit information about revenues, ownership, and placement of wires and equipment. None of these requirements bar entry or have the effect of prohibiting telecommunications services.

Qwest contends § 253(a) prohibits the Cities from basing right-of-way fees on Qwest's gross revenues.

Qwest's argument depends on its erroneous presumption "that the only legitimate exercise of local regulatory authority under section 253(a) is the recovery of the costs of the use of local rights-of-way." *City of Eugene,* 177 Or. App. at 410, 35 P.3d at 1048 (rejecting this argument). Section 253(a) does not address revenue-based fees, much less categorically forbid them. *See City of Dearborn,* 206 F.3d at 624-25 (§ 253 does not preempt franchise fee equal to 4% of gross revenues). Section 253 preempts right-of-way fees only if the fees would effectively prohibit the provision of a telecommunications service. Even then, such fees would be authorized by § 253(c) if they qualified as "fair and reasonable compensation" for the use of rights of way.

In challenging revenue-based fees, Qwest relies on a statement from the *City of Auburn* opinion: "Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as required under the Telecom Act." 260 F.3d at 1176 (footnote omitted). I agree with the Cities that when the *City of Auburn* opinion referred to "non-cost-based fees," it specified application fees, not right-of-way fees. *See City of Auburn,* 260 F.3d at 1179 n.19. That is because in the *City of Auburn* litigation, the Ninth Circuit had no reason to address whether § 253 preempted the municipalities' 6% revenue-based "gross receipts tax." Qwest expressly conceded the tax's validity. 260 F.3d at 1176 n.10 ("The parties agree that Washington law allows for a six percent gross receipts tax."); Cities' Mem. in Supp. at 14-15 (quoting Qwest's concession in the *City of Auburn* litigation that it was not challenging "ROW fees based on gross revenues"). Just as here, the Washington cities imposed the revenue-based fees because of Qwest's use of public rights

of way. *See, e.g.,* Beery Aff., Ex. 23, at 5 (City of Auburn ordinance requiring "Franchise fee" for use of public ways "not to exceed six percent . . . of Gross Revenues"). I see no legally significant distinction between the revenue-based right-of-way fees in *City of Auburn,* whose validity Qwest expressly conceded, and the fees at issue here.

In determining whether a city's right-of-way fees bar entry into a market, it makes little difference whether the city refers to the right-of-way charges as fees or taxes. The court should focus on a right-of-way fee's effects, not its label. In *City of Auburn,* the state statute referred to a "gross receipts tax," while several of the municipal ordinances referred to "franchise fees" or "rights-of-way fees." *See* Cities' Mem. in Supp., at 14 (quoting Tacoma and Auburn ordinances). Similarly, the Oregon legislature, in allowing Oregon cities to impose revenue-based fees, referred to a "privilege tax." Or. Rev. Stat. § 221.515. I conclude that the *City of Auburn* decision does not stand for the proposition that § 253(a) categorically bars all revenue-based right-of-way fees.

Because Qwest has failed to show that any of the Cities' challenged requirements individually or in combination bar competition or have the effect of prohibiting any telecommunications services, Qwest's claims against the Cities must fail. Conversely, there are no issues of material fact regarding Qwest's liability to the Cities for the revenue-based right-of-way fees. I conclude as a matter of law that Qwest's failure to pay the fees breached its franchise agreements with the Cities. The only issues of material fact remaining concern the precise amounts due each City.

Because of these rulings, I will not address the Cities' argument that Qwest's requested relief would violate the Tax Injunction Act, 28 U.S.C. § 1341. *Cf. Qwest Communications Corp. v. City of Berkeley,* 146 F. Supp. 2d 1081, 1093 (N.D. Cal. 2001) (municipality's right-of-way fees were "regulatory fees rather than taxes").

III. Qwest's Challenge Is Barred by Claim and Issue Preclusion

There is an alternative reason for granting summary judgment for the Cities as to the 7% revenue-based fees. The Oregon Court of Appeals has rejected Qwest's challenge to the City of Eugene's telecommunications ordinance, upholding a 7% revenue-based fee for use of public rights of way. *US West Communications, Inc. v. City of Eugene,* 177 Or. App. 424, 37 P.3d 1001 (2001) (companion case to *City of Eugene*). The Oregon court specifically held that § 253 did not preempt the City of Eugene's telecommunications ordinance.

The doctrine of claim preclusion bars Qwest from bringing a second challenge to the City of Eugene's 7% revenue-based fee. The parties and relevant facts here are the same as those in the *City of Eugene* litigation. *See Rennie v. Freeway Transport,* 294 Or. 319, 323, 656 P.2d 919, 921 (1982) (requirements for claim preclusion under Oregon law). Claim and issue preclusion apply to state court rulings on federal preemption issues. *See Morgan Stanley Mortgage Capital Inc. v. Insurance Comm'r,* 18 F.3d 790, 792-93 (9th Cir. 1994).

Similarly, issue preclusion bars Qwest from challenging the other Cities' revenue-based right-of-way fees. The issues at stake in the two actions are essentially identical,

and Qwest had a fair opportunity to contest the issue in the prior litigation. *See State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 275 Or. 97, 103, 550 P.2d 1185, 1188 (1976) (requirements for issue preclusion, referred to as collateral estoppel, under Oregon law).

Because claim and issue preclusion apply, I need not address the *Rooker-Feldman* doctrine, which provides that lower federal courts lack jurisdiction "to hear a case that would require the court to review a state court judgment, even if the case presents federal constitutional issues, and even if the state court judgment is not from the state's highest court." *Ahmed v. Washington*, 276 F.3d 464, 467 (9th Cir. 2001); *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 & n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). I also need not address whether judicial estoppel bars Qwest's challenge to revenue-based fees here because of Qwest's concessions in the *City of Auburn* litigation. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

IV. Safe Harbor Provision Protects Revenue Based Fees

The Cities' revenue-based fees would still be valid under the safe-harbor provision of § 253(c), even if § 253 preempted the other challenged requirements. Section 253(c) allows cities to impose regulations that "manage the public rights-of-way" and to "require fair and reasonable

compensation" for the use of rights of way "on a competitively neutral and nondiscriminatory basis."

I disagree with Qwest's contention that Congress intended to limit "fair and reasonable compensation" to Qwest's actual cost of using the public rights of way. Congress could have expressly limited right-of-way fees to actual costs, but it did not do so. *See City of Dearborn,* 206 F.3d at 625 (" 'costs' and 'compensation' are not the same"). *See also BellSouth Telecommunications, Inc. v. City of Orangeburg,* 522 S.E.2d 804, 808 (S.C. 1999) ("franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable"). For example, in 47 U.S.C. § 224, which regulates cable television providers' use of utilities' poles, Congress defines "just and reasonable rates" "in terms of recovery of additional costs borne by the utility in providing pole attachments." *City of Dearborn,* 206 F.3d at 624.

I conclude that the Cities' revenue-based fees are "fair and reasonable compensation" for Qwest's use of the Cities' public rights of way.[4] Qwest apparently considered 7% revenue-based fees reasonable when it sponsored the state statute allowing such fees. Qwest also willingly accepted such fees when it negotiated franchise agreements with the Cities. *See id.,* 206 F.3d at 625 (revenue-based fee was "fair and reasonable" partly because "TCG had agreed in earlier negotiations to a fee almost identical

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[4] In an appellate brief filed with the Second Circuit, the Federal Communications Commission expressed doubts whether § 253(c) allowed revenue-based fees. *See* Qwest's Mot. to File Supp. Pleading, Ex. C, at 9 n.5. The FCC has not, however, directly addressed the issue. In any event, the FCC's statements about § 253(c) do not affect my interpretation of § 253(a).

to what it was now challenging as unfair" (footnote omitted)).

Even if I were to agree with Qwest that one or more of the Cities' non-fee requirements violates § 253(a), I would conclude that the Cities' fee requirements may be severed from any invalid requirements.[5] Oregon law favors severing the invalid provisions of an ordinance rather than striking down the entire ordinance. *See Advocates for Effective Regulation v. City of Eugene,* 176 Or. App. 370, 376, 32 P.3d 228, 231 (2001). The Cities' charters and ordinances show an express preference for severability. I conclude that even if some of the Cities' requirements were held to be preempted, the preempted requirements could be severed from the fees and other requirements without rendering the franchise agreements or ordinances impossible to enforce.

V. Qwest Is Not Entitled to a Stay for Additional Discovery

Qwest contends that this court should stay its rulings on the parties' cross-motions for summary judgment and allow Qwest to conduct additional discovery. *See* Fed. R. Civ. P. 56(f) (court may deny summary judgment or order a continuance to allow opposing party to take discovery). I disagree that further discovery is necessary.

To obtain a stay pending discovery, Qwest must show that discovery would uncover specific facts which would preclude summary judgment. *Maljack Prod., Inc. v.*

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[5] Qwest apparently does not challenge charter provisions or ordinances for the Cities of Happy Valley, Keizer, and North Plains.

GoodTimes Home Video Corp., 81 F.3d 881, 888 (9th Cir. 1996). I conclude that preemption may be decided on the record before me as a matter of law, and that additional discovery is unnecessary.

CONCLUSION

The Cities' motions for summary judgment (#72-2, 165-1, 172-1, 178-2) are granted. Qwest's motions for summary judgment (#8-1, 157-1) are denied.

DATED this 22nd day of March, 2002.

/s/ John Jelderks
John Jelderks
U.S. Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QWEST CORPORATION,
a Colorado corporation,

Plaintiff-Appellant,

v.

CITY OF PORTLAND, an Oregon municipal corporation;,

Defendant-Appellee,

CITY OF HAPPY VALLEY; et al.,

Defendant-Intervenors-Appellees.

No. 02-35473

D.C. No. CV-01-01005-JE

District of Oregon, Portland

ORDER

(Filed Dec. 17, 2004)

Before: ALARCÓN, FERGUSON, and RAWLINSON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Rawlinson voted, and Judges Alarcon and Ferguson recommended, to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

Appellant's petition for rehearing and petition for rehearing en banc filed on October 26, 2004, are DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QWEST CORPORATION, a Colorado corporation, Plaintiff-Appellant, v. CITY OF PORTLAND, an Oregon municipal corporation;, Defendant-Appellee, CITY OF HAPPY VALLEY; et al., Defendant-Intervenors-Appellees.	No. 02-35473 D.C. No. CV-01-01005-JE District of Oregon, Portland ORDER (Filed Dec. 17, 2004)

Before: ALARCÓN, FERGUSON, and RAWLINSON, Circuit Judges.

Judge Rawlinson voted, and Judges Alarcon and Ferguson recommended, to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

Intervenor City of Eugene's petition for rehearing en banc filed October 26, 2004, is DENIED.